

Howard S. Weitzman
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Revised April 28, 2008
March 10, 2008

Dear Special District Commissioner:

Nassau County Charter § 402[6] gives this office the authority to audit special districts. As you know, we have released audits of special districts starting in 2005. In those audits, we commented critically on those instances where we found professional consultants, such as lawyers or accountants, on district payrolls as employees when they were properly treated as consultants. In determining whether a consultant could properly be considered an employee by a special district, we have relied on the IRS rules that are laid out in IRS Publication 15-A. Our audits have found:

Franklin Square Water District had two outside attorneys on payroll, receiving health benefits and pension credits;

Great Neck Water Pollution Control District had an attorney on payroll receiving health benefits who was entitled to pension credits under his retainer agreement, though his time was never reported to the state;

Town of Hempstead Sanitary District One had one outside accountant on payroll receiving pension credits and one outside attorney on payroll receiving health benefits;

Town of Hempstead Sanitary District Two had two outside attorneys on payroll with health benefits but no pension credits reported;

Town of Hempstead Sanitary District Six had four outside attorneys on payroll, three of whom received health benefits and pension credits;

Web links to these reports can be found on the Comptroller's website at:
<http://www.nassaucountyny.gov/agencies/Comptroller/Audits/index.html>.

In light of the recent media revelations about the improper categorization of consultants as employees of school districts, we are reviewing this issue for all commissioner-run special districts in Nassau County where we have audit authority. Please respond to the enclosed questionnaire (Attachment 1) by March 31. For guidance on determining if an individual is an employee or independent contractor, you may find the attached excerpt from IRS Publication 15-A helpful (Attachment 2).

The Office of the New York State Attorney General is investigating these practices statewide, and has asked for this office's cooperation. Please be advised that we may share results of our findings with the Attorney General's office. Also, if you believe that your district may be engaged in questionable activity in this regard, we urge you to contact our office at 516-571-2386 or

comptrollerfieldaudit@nassaucountyny.gov and the Attorney General's office at 212-416-8090 or publicintegrity@oag.state.ny.us

Thank you for your cooperation. If you have any questions concerning this request, please contact Mr. Doug Hutter, 516-571-1145.

Very truly yours,

A handwritten signature in black ink, appearing to read "Howard S. Weitzman", with a stylized flourish at the end.

Howard S. Weitzman
Nassau County Comptroller

Enc.

C: Attorney General Andrew M. Cuomo

Questionnaire Concerning Consultants on Payroll

Please provide the following information for all outside consultants (for example lawyers, accountants, engineers and public relations providers) being paid a salary from the District and/or receiving health benefits and/or receiving pension credits. This questionnaire covers the period January 1, 2005 through March 31, 2008.

Name of District: _____

Name	Type of Consultant	Indicate F/T or P/T	Period Employed (Jan. 1, 2005 to present)	Annual Salary paid to Consultant	Total Fees Paid to Consultant's Firm	Health Benefits or Buy back provided? (Yes/No)	Pension credits reported? (Yes/No)	Number of Days Service Reported for Pension	Time Sheets on File for Employee? (Yes/No)

Signature of Commissioner or District Superintendent_____
Date

Return by March 31, 2008 to:
Nassau County Comptroller Howard S. Weitzman
240 Old Country Road, Room 210
Mineola, NY 11501

Employee or Independent Contractor?

An employer must generally withhold federal income taxes, withhold and pay social security and taxes, and pay unemployment tax on wages paid to an employee. An employer does not generally have to with-hold or pay any taxes on payments to independent contractors.

Common-Law Rules

To determine whether an individual is an employee or an independent contractor under the common law, the relationship of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties. These facts are discussed below.

Behavioral control. Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

Instructions that the business gives to the worker. An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work.

- When and where to do the work.
- What tools or equipment to use.
- What workers to hire or to assist with the work.
- Where to purchase supplies and services.
- What work must be performed by a specified individual.
- What order or sequence to follow.

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

Training that the business gives to the worker. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control. Facts that show whether the business has a right to control the business aspects of the worker's job include:

The extent to which the worker has unreimbursed business expenses. Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services that they perform for their business.

The extent of the worker's investment An independent contractor often has a significant investment in the facilities he or she uses in performing services for some-one else. However, a significant investment is not necessary for independent contractor status.

The extent to which the worker makes his or her services available to the relevant market. An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.

How the business pays the worker. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.

The extent to which the worker can realize a profit or loss. An independent contractor can make a profit or loss.

Type of relationship. Facts that show the parties' type of relationship include:

- *Written contracts describing the relationship the parties intended to create.*
- *Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation and sick pay,*
- *The permanency of the relationship.* If you engage a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that your intent was to create an employer-employee relationship.
- *The extent to which services performed by the worker are a key aspect of the regular business of the company.* If a worker provides services that are a key aspect of your regular business activity, it is more likely that you will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.